No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARVIN STONE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
LISA DORNELL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the filing of a motion requesting that the Board of Immigration Appeals reopen or reconsider a final deportation order postpones the running of the 90-day period for seeking judicial review of such an order under 8 U.S.C. 1105a(a)(1) (Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 13 F.3d 934. The decisions of the Board of Immigration Appeals (Pet. App. B1-B15, B16-B19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1994. The petition for a writ of certiorari was filed on January 26, 1994, and was granted on May 23, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions, 8 U.S.C. 1103 and 1105a(a) (1988 & Supp. IV 1992), and regulatory provisions, 8 C.F.R. 3.2, 3.6(a) and (b), 3.8 and 243.1, are set forth at App., *infra,* 1a-10a.

STATEMENT

This case concerns the deadline established by the Immigration and Nationality Act (INA), as amended, by which a petition for judicial review of a final deportation order must be filed. Under 8 U.S.C. 1105a(a)(1) (Supp. IV 1992), "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order." Implementing regulations provide that "an order of deportation * * * shall become final upon dismissal of an appeal by the Board of Immigration Appeals." 8 C.F.R. 243.1.

The court of appeals found that the order of the Board of Immigration Appeals (Board) dismissing petitioner's appeal of the immigration judge's deportation order was final upon issuance. The court further held that petitioner's motion requesting that the Board reopen or reconsider that order did not postpone the 90-day period within which to petition for review of it in the court of appeals. Because petitioner did not file a petition for judicial review of the Board's final deportation order until more than a year after it was issued, the court held that the petition was out of time under Section 1105a(a)(1).

1. Petitioner is a citizen of Canada who entered the United States as a nonimmigrant visitor for business in 1977 and has resided in the United States since that date.[1] On January 2, 1983, petitioner was convicted of conspiracy and mail fraud, in violation of 18 U.S.C. 371 and 1341. He was sentenced to three years' imprisonment on one count and received a five-year suspended sentence on other counts, with probation imposed for five years. See Pet. App. A2, B2-B3. Petitioner's convictions were affirmed on appeal, *United States* v. *Stone*, 748 F.2d 361 (6th Cir. 1984); see Pet. App. B3, and he served approximately 18 months in a federal correctional institution on the three-year sentence. *Id.* at A2.

2. In March, 1987, the Immigration and Naturalization Service (INS) served petitioner with an order to show cause why he should not be deported from the United States under 8 U.S.C. 1251(a)(2),[2] on the ground that he is a nonimmigrant who remained in the United States beyond the period authorized by law. Admin. Rec. (A.R.) 362. Following a deportation hearing, an immigration judge determined that petitioner is deportable and ordered him deported.[3] A.R. 109-115. The judge explained that prior to 1978, regulations limited to six months the period of time that aliens admitted as nonimmigrant visitors for business could remain in the United States without obtain-

[1] The court of appeals and the Board relied on petitioner's admission that he entered the United States in 1977. Pet. App. A2, B4. At one point, however, the Board indicated that petitioner entered in 1978. *Id.* at B2. That statement appears to be erroneous. Whether petitioner entered in 1977 or 1978 has no effect on petitioner's immigration status, however, because the length of his stay in this country without obtaining an extension from the INS was longer than permitted in either event. See note 4, *infra*.

[2] This section was recodified in 1990 and is now found at 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992). See Immigration Act of 1990, Pub. L. No. 101-649, § 602(a), 104 Stat. 5077-5079. The new version does not apply, however, to cases, such as petitioner's, in which notice was provided prior to March 1, 1991, of deportation proceedings. See Immigration Act of 1990, Pub. L. No. 101-649, § 602(d), 104 Stat. 5082.

[3] The INA authorizes the Attorney General to delegate her powers and duties under the Act to other government officials. 8 U.S.C. 1103(a). The Attorney General has delegated the power to determine deportability and to issue deportation orders to immigration judges (see 8 U.S.C. 1252(b)), whose decisions are subject to review by the Board of Immigration Appeals. 8 C.F.R. 3.1(b)(2), 3.10, 242.8, 242.21.

ing an extension of time to stay. See 8 C.F.R. 214.2(b) (1977).[4] The judge reasoned that based on petitioner's testimony, he is an alien who entered the United States in 1977 as a nonimmigrant visitor for business purposes, did not obtain any extension of time to remain in the United States, remained longer than six months, and therefore is deportable under Section 1251(a)(2).

The immigration judge denied petitioner's application under 8 U.S.C. 1254(a) for suspension of deportation.[5] Under Section 1254(a)(1), the Attorney General is

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[4] 8 C.F.R. 214.2(b) (1977) provided:

> *Visitors.* The classification of visitors in the Act has been subdivided for visa, admission, and extension purposes into visitors for business (B-1) and visitors for pleasure (B-2). A B-1 visitor may be admitted for an initial period of not more than six months and may be granted extensions of temporary stay in increments of not more than six months. A B-2 visitor shall ordinarily be admitted for a period of not more than six months, but may be admitted for a longer period not exceeding one year if the admitting immigration officer determines that emergent, compelling, or other special circumstances exist warranting such longer admission period.

In March, 1978, the regulation was modified to provide that B-1 and B-2 visitors were to be treated the same – both would "be admitted for an initial period of not more than 1 year and may be granted extensions of temporary stay in increments of not more than 6 months." 8 C.F.R. 214.2(b) (1979); see 43 Fed. Reg. 12,674 (1978). In petitioner's case, because he stayed longer than one year without obtaining an extension, he is deportable regardless of whether he was a visitor for business or for pleasure and regardless of whether he entered in 1977 or 1978.

[5] The immigration judge also denied petitioner's request for a further continuance in order to make a collateral attack on his criminal conviction. A.R. 111. The immigration judge explained that petitioner's conviction had been affirmed on direct appeal and that petitioner had had ten months since the issuance of the order to show cause during which he could have pursued collateral relief. *Id.* at 111-112.

authorized to suspend the deportation of an alien who has been physically present in the United States for at least seven years immediately preceding his application if the person is "of good moral character," and if his deportation would result in extreme hardship to the alien or to an immediate relative who is a citizen or lawful permanent resident of the United States. A person cannot meet the "good moral character" requirement, however, if he was "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such [seven-year] period." 8 U.S.C. 1101(f)(7). The immigration judge concluded that petitioner was ineligible for suspension of deportation because his incarceration for approximately 18 months based on his 1983 conspiracy and mail fraud convictions exceeded the 180-day maximum. See Pet. App. A3.[6]

3. Petitioner filed an appeal to the Board of Immigration Appeals, which dismissed the appeal in a decision issued on July 26, 1991. Pet. App. B1-B15. The Board affirmed the immigration judge's finding that petitioner is deportable, *id.* at B5-B9, emphasizing that "[t]he regulations did not provide in either 1977 or 1978, that a visitor could be admitted, for business or pleasure, for an indeterminate amount of time," *id.* at B7-B8.

The Board also affirmed the immigration judge's denial of petitioner's application for suspension of deportation.

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[6] The immigration judge likewise denied petitioner's request for voluntary departure under 8 U.S.C. 1254(e), because he did not satisfy the statutory requirement of "good moral character."

The Board agreed with the immigration judge's determination that petitioner was statutorily precluded from satisfying the "good moral character" prerequisite, Pet. App. B11-B12, and reasoned that petitioner is statutorily ineligible for suspension of deportation for the additional reason that he failed to establish extreme hardship, *id.* at B12-B14. Finally, the Board concluded that even if petitioner were statutorily eligible for suspension of deportation, it would deny relief in the exercise of its discretion because of petitioner's conspiracy and mail fraud convictions and the fact that there were outstanding arrest warrants for petitioner in Canada on charges of theft and fraud. *Id.* at B14-B15.[7]

4. On or about August 21, 1991, petitioner filed a motion with the Board captioned "Motion to Reopen and/or to Reconsider Its Decision; Appeal to the Board of Immigration Appeals." A.R. 10. In the motion, petitioner requested that the Board "reopen its hearing, and/or reconsider its decision," based on four enumerated grounds. *Id.* at 11. First, petitioner claimed that the Board did not "fully address the correctness and adequacy of the 'order to show cause' as previously submitted by [petitioner] in his appeal to th[e] Board," and he requested that one of the cases cited by the Board " 'be read' in his favor." *Id.* at 11-12. Petitioner described his second ground as "repeat[ing] his argument number 4 as contained on page 11 of his original appeal to [the] Board," in which he claimed that the 1977 and 1978 regulations and conditions imposed on Canadians entering the United States were invalid. *Id.* at 12. Petitioner's third and fourth grounds for reconsideration consisted of citations to two Board deci-

[7] The Board rejected or dismissed other challenges raised by petitioner that are not relevant to the issue presented for review. See Pet. App. B9-B11.

sions, both more than ten years' old and neither relevant to his case. *Id.* at 13.[8]

The Board denied petitioner's motion in an order dated February 3, 1993. Pet. App. B16-B19. The Board explained that petitioner's motion

> presented no new precedent decisions which have any bearing on our prior decision in this case nor has [h]e submitted any legal authorities which the Board may have inadvertently overlooked. Moreover, both of [petitioner's] assertions in his motion to reconsider were adequately addressed by the Board in its July 26, 1991, decision. Accordingly, we will deny the motion as frivolous.

Id. at B18.

5. Petitioner filed a petition for review in the court of appeals on March 25, 1993.[9] The court of appeals dis-

[8] Although petitioner's motion was captioned a "Motion to Reopen and/or to Reconsider Its Decision," A.R. 10, the Board and the court of appeals treated the motion solely as one to reconsider. Under the regulations authorizing such motions, the standards for the two motions differ:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent.

8 C.F.R. 3.8(a).

[9] The court of appeals' opinion and the certiorari petition both state that the petition for review was filed in the court of appeals on March 25, 1993. Pet. App. A4; Pet. 6. The court of appeals' docket sheet indicates, however, that petitioner's opening brief was filed on that date and that the petition for review was filed on February 16, 1993. Resolution of that discrepancy is unnecessary for purposes of this case, because both dates are more than 90 days after the Board's July 26, 1991, final deportation order and less than 90 days after the Board's February, 3, 1993, denial of petitioner's motion for recon-

missed the petition in part and denied it in part. Pet. App. A1-A11.

a. The court of appeals dismissed the petition for want of jurisdiction to the extent it sought review of the Board's July 26, 1991, deportation order. The court explained that under 8 U.S.C. 1105a(a)(1) (Supp. IV 1992), a petition for judicial review of a final deportation order must be filed within 90 days of the date of the order. It noted that when the Board dismissed petitioner's appeal on July 26, 1991, the deportation order became final under 8 C.F.R. 243.1, which provides that "an order of deportation * * * shall become final upon dismissal of an appeal by the Board." Pet. App. A4-A5. Petitioner, however, did not file a petition for judicial review until March 25, 1993. The court held that petitioner's filing of a motion to reconsider by the Board in August, 1991, although it was within the 90-day period to file a petition for judicial review, did not postpone the time for seeking judicial review. *Id.* at A9.

In reaching that conclusion, the court of appeals reviewed the circumstances of the 1961 enactment of Section 106 of the INA, 8 U.S.C. 1105a. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. The court noted that the "fundamental purpose" of the new Section 1105a was to abbreviate the process of judicial review of deportation orders, so as to "frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." Pet. App. A4-A5 (quoting *Foti* v. *INS*, 375 U.S. 217, 224 (1963)).

The court noted that prior to 1990, a split of authority had developed among the courts of appeals regarding whether the time for seeking judicial review under Section

sideration. To avoid confusion, we, like the court of appeals and petitioner, shall use the date of March 25, 1993.

1105a(a) is extended by the filing of a motion with the Board to reopen or reconsider. After analyzing the conflicting rulings of the Third and Ninth Circuits,[10] the court below acknowledged that both approaches were intended to implement Congress's intent to expedite the review process; it concluded, however, that "given the way in which the system works in practice the Ninth Circuit approach seems more conducive to dilatory tactics than does the Third Circuit approach." Pet. App. A7. The court of appeals explained that "[g]iven the measured pace at which the I.N.S. often operates, the filing of a motion for reconsideration may, under the Ninth Circuit approach, mean that the day of judgment in the court of appeals—and actual deportation—will not arrive until months or years later than would otherwise have been the case." *Ibid.*

Ultimately, the court of appeals concluded that "[w]hatever the law may have been previously, we do not believe that the Ninth Circuit approach is consistent with the statute as amended in 1990." Pet. App. A8. The court pointed out that not only did the 1990 amendments cut in

[10] The court noted that in *Nocon* v. *INS*, 789 F.2d 1028, 1033 (1986), the Third Circuit held that the filing of a motion to reopen or reconsider does not suspend the statutory time limit for seeking judicial review because such an interpretation would defeat the statutory purpose of preventing undue delay in deportation once the alien's status is determined. Pet. App. A5. By contrast, in *Bregman* v. *INS*, 351 F.2d 401 (1965), the Ninth Circuit held that if a motion to reopen is filed with the Board within the statutory period for filing a petition for judicial review—and if the petition for review is subsequently filed within the statutory period after denial of the motion to reopen—the court of appeals has jurisdiction to review both Board orders. Pet. App. A6-A7 & n.4 (also citing *Hyun Joon Chung* v. *INS*, 720 F.2d 1471 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *Attoh* v. *INS*, 606 F.2d 1273 (D.C. Cir. 1979); *Pierre* v. *INS*, 932 F.2d 418 (5th Cir. 1991); and *Fleary* v. *INS*, 950 F.2d 711 (11th Cir. 1992), "all of which stem from the Ninth Circuit's decision in *Bregman*").

half the time period for seeking judicial review, they also added a provision requiring that any judicial review of a denial of a motion to reopen or reconsider shall be consolidated with the judicial review of the final deportation order. Pet. App. A8; see 8 U.S.C. 1105a(a)(6) (Supp. IV 1992), as enacted by the Immigration Act of 1990, Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 5065. In the court's view, the consolidation provision would make no sense unless separate petitions for judicial review could be filed: "If Congress had intended to provide for a single petition for review covering both the original deportation order and the subsequent denial of a motion for reconsideration, there would not be two review proceedings to consolidate." Pet. App. A8. Noting that some courts of appeals have rejected this position even after the 1990 amendments,[11] the court below agreed with the approach taken by the Third and Seventh Circuits and held that petitioner's deportation order was final when the Board issued it on July 26, 1991, and "remained a final order notwithstanding [petitioner's] subsequent filing of a motion for reconsideration." *Id.* at A9. Thus, the petition filed on March 25, 1993, for judicial review of the July 26, 1991, deportation order was out of time, and the court of appeals did not have jurisdiction to review that order.[12]

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[11] The court contrasted the reasoning of the Eleventh Circuit in *Fleary* v. *INS*, 950 F.2d 711 (1992) (which followed the Ninth Circuit's pre-1990 position), with the Seventh Circuit's reasoning in *Akrap* v. *INS*, 966 F.2d 267, 271 (1992) (which concluded that the 1990 enactment of the statutory provision for consolidation of petitions for judicial review "has put to rest" the earlier conflict between the Third and Ninth Circuits, and requires the conclusion that the filing of a motion for reconsideration does not postpone the time for filing a petition for judicial review).

[12] The court of appeals rejected petitioner's contention that the government should be estopped from relying on the jurisdictional bar because petitioner allegedly received erroneous advice from government employees regarding the procedure for seeking judicial review. Pet. App. A9-A10. The court pointed out that petitioner was trained as a lawyer and concluded that, in any event, petitioner had not established any "affirmative misconduct" by the government, which would be required to invoke estoppel. *Id.* at A10. The court also stated that it would have been obliged to raise the jurisdictional bar *sua sponte*, even if the government were estopped from raising it, because a court is prohibited by Federal Rule of Appellate Procedure 26(b) from enlarging the time for filing a petition for review. Pet. App. A10.

b. To the extent petitioner sought judicial review of the Board's February 3, 1993, order denying his motion for reconsideration, the court of appeals exercised jurisdiction because the petition for review had been filed within 90 days of that order. On the merits, however, the court of appeals "fully agree[d] with the Board's characterization of the motion as 'frivolous,'" and it therefore held that the Board did not abuse its discretion in denying the motion for reconsideration. Pet. App. A11.[13]

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[13] Whether the court of appeals properly reached the merits of the Board's denial of the motion for reconsideration is a question not presented in this case. In *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), however, the Court held that the ICC's denial of a motion to reconsider was not reviewable by the court of appeals because it alleged only material errors in the ICC's earlier disposition and did not allege any new evidence or changed circumstances. The granting or denial of such a motion, the Court reasoned, is committed to agency discretion and therefore is unreviewable under the Administrative Procedure Act, 5 U.S.C. 701(a)(2), and the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.* 482 U.S. at 277-284.

The court below relied on *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam), to support its exercise of jurisdiction to review the denial of petitioner's motion to reopen or reconsider. See Pet. App. A10. The question whether the court of appeals had subject matter jurisdiction over the petition for review is distinct from the question whether

SUMMARY OF ARGUMENT

Congress has clearly stated that in order to invoke the jurisdiction of the court of appeals to review an order of deportation, an alien must file a petition for judicial review "not later than 90 days" after issuance of a "final deportation order." 8 U.S.C. 1105a(a)(1) (Supp. IV 1992). Under the regulations promulgated by the Attorney General, an order by the Board of Immigration Appeals (Board) dismissing an appeal of an order of deportation is a final order for purposes of Section 1105a(a)(1). The Attorney General's interpretation is reasonable and entitled to deference, and it is not inconsistent with the Immigration and Nationality Act (INA), as amended. Deference is especially due the Attorney General's interpretation in this case because the INA leaves undefined the term "final deportation order," and the INA grants the Attorney General the authority to establish regulations to implement the statutory scheme for deportation proceedings.

The text, structure, and background of the INA judicial review provisions reinforce the validity of the Attorney General's interpretation. There is nothing in the language of the INA requiring that the filing of a motion to reopen or reconsider postpones the statutory deadline for filing a petition for judicial review or renders a final deportation order "nonfinal."

Petitioner nonetheless contends that the Court should inject into immigration deportation proceedings the toll-

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judicial review of a particular issue (the denial of a motion to reconsider) is foreclosed because resolution of that issue is committed to agency discretion. Cf. *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). If the motion for reconsideration in this case is properly characterized as one alleging only legal or factual error in the original decision, and not one alleging new evidence or changed circumstances, the Board's denial of the motion would appear to be unreviewable under *Locomotive Engineers*.

ing doctrine adopted by the Court in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987). The rationale underlying the adoption of the tolling result in *Locomotive Engineers* does not require rejection of the Attorney General's approach. The Court stated in *Locomotive Engineers* that 5 U.S.C. 704 does not *prevent* the filing of a petition for reconsideration from rendering the order under reconsideration nonfinal. It did not hold that 5 U.S.C. 704 *requires* that a motion for reconsideration be given that effect under all statutory schemes. The unique circumstances presented by orders of deportation counsel against expansion of the *Locomotive Engineers* rationale to override the Attorney General's regulatory implementation of the INA. Congress's "fundamental purpose" in enacting the judicial review procedures in the INA was to "abbreviate the process of judicial review of deportation orders in order to frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963). The Court has recognized that in a deportation case, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 112 S. Ct. 719, 724-725 (1992); *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The framework for judicial review crafted by Congress to minimize such delays in deportation cases should not be undermined by this Court's creation of a tolling exception.

ARGUMENT

AN ALIEN'S FILING OF A MOTION TO REOPEN OR RECONSIDER A FINAL DEPORTATION ORDER DOES NOT POSTPONE THE RUNNING OF THE 90-DAY PERIOD FOR SEEKING JUDICIAL REVIEW OF THE ORDER

A. The Attorney General's Regulatory Definition Of What Constitutes A Final Deportation Order Is Reasonable And Entitled To Great Deference

1. Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a (1988 & Supp. IV 1992), establishes

"the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act." 8 U.S.C. 1105a(a) (Supp. IV 1992). As part of that "exclusive procedure," Section 1105a(a)(1) imposes a strict time limitation on seeking judicial review. As amended in 1990, it provides:

> **(1) Time for filing petition**
>
> a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony,[14] not later than 30 days after the issuance of such order.

8 U.S.C. 1105a(a)(1) (Supp. IV 1992).[15]

The INA does not define "final deportation order," which triggers the running of the 90-day period for seeking judicial review. Immediately after Section 1105a was enacted in 1961, however, the Attorney General filled the statutory gap by promulgating a regulation to define that term. The regulation specified, in relevant part:

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[14] The term "aggravated felony" includes murder, drug trafficking, trafficking in firearms, certain offenses relating to money laundering, and crimes of violence for which the term of imprisonment imposed is at least five years. 8 U.S.C. 1101(a)(43) (Supp. IV 1992).

[15] At the time of its enactment in 1961, Section 1105a(a)(1) provided in relevant part that a petition was to be filed "not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later." Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. The 90-day time period applies to petitioner's case because his final deportation order was entered on July 26, 1991, and the 1990 amendment applies to all final orders entered on or after January 1, 1991. Immigration Act of 1990, Pub. L. No. 101-649, § 545(g)(4), 104 Stat. 5067.

> **Final order of deportation.**
>
> [A]n order of deportation * * * shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken.

26 Fed. Reg. 12,113 (1961); see 8 C.F.R. 243.1 (1962). The introduction to the rule explained that Section 243.1 "is new and is being added to show when an order of deportation becomes final." 26 Fed. Reg. 12,111 (1961). The regulation has remained in effect since 1961, see 8 C.F.R. 243.1 (1994), and although Congress has since amended the relevant statutory provisions, it has not modified the Attorney General's definition during the intervening 33 years.

The Attorney General's regulations have also long made clear that motions to reopen or reconsider do not affect the finality of a Board order dismissing an appeal. Even prior to the enactment of Section 1105a in 1961, the regulations specified that "[t]he decision of the Board shall be final," 17 Fed. Reg. 11,475 (1952), originally codified at 8 C.F.R. 6.1(d)(2) (1953) (recodified at 8 C.F.R. 3.1(d)(2) (1959), see 23 Fed. Reg. 9117 (1958)), and that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case," 17 Fed. Reg. 11,476, 11,478 (1952), originally codified at 8 C.F.R. 6.21(a) and 8.11(a) (1953) (recodified at 8 C.F.R. 3.8(a) (1959), see 23 Fed. Reg. 9118 (1958)).[16]

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[16] By contrast, the pre-1961 regulations made clear that an automatic stay of deportation was provided at the earlier stage of an administrative appeal to the Board. See 17 Fed. Reg. 11,476 (1952), originally codified at 8 C.F.R. 6.14 (1953) (recodified at 8 C.F.R. 3.6 (1959), see 23 Fed. Reg. 9118 (1958)). That regulation is now codified

The regulation specifying that deportation is not stayed pending disposition of a motion to reopen or reconsider—which has remained in effect ever since 1952, 8 C.F.R. 3.8(a) (1994)—confirms the full import of the regulation that specifies when an order of deportation becomes "final." Finality is "concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2543 (1993) (quoting *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193 (1985)). By not providing for an automatic stay pending the Board's disposition of a motion to reopen or reconsider, the filing of such a motion does not alleviate the consequences of the order of deportation, and therefore does not render it "nonfinal." See

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at 8 C.F.R. 3.6(a), and is accompanied by a modification added in 1971 that specifies that the provision for an automatic stay pending administrative appeal does *not* apply to an administrative officer's denial of a motion to reopen or reconsider or to stay deportation, except where the administrative officer granted a stay pending appeal. The Board, however, may stay the deportation, in its discretion, in such circumstances. 8 C.F.R. 3.6(b); see 36 Fed. Reg. 316 (1971). In addition, when a motion to reopen or reconsider is filed with the immigration judge in a deportation proceeding, the execution of an outstanding deportation order is not automatically stayed. 8 C.F.R. 242.22.

The pre-1961 regulations were promulgated soon after the enactment of the INA, Act of June 27, 1952, ch. 477, 66 Stat. 163. 17 Fed. Reg. 11,469 (1952). In certain respects, the pre-1961 regulations constituted modifications and recodifications of regulations that predated the 1952 enactment of the INA and implemented the Immigration Act of 1917. Those regulations provided that a deportation order was automatically stayed pending administrative appeal to the Board, see 8 C.F.R. 90.9(b) (1949) ("Filing of an appeal shall operate to stay the execution of the * * * order until action on the appeal has been completed."), but made the issuance of a stay pending disposition of a motion to reopen or reconsider discretionary, see, *e.g.*, 8 C.F.R. 90.10, 90.11 (1949).

8 U.S.C. 1252(c) (Attorney General may effect alien's deportation "[w]hen a final order of deportation under administrative processes is made").[17]

Other aspects of the regulatory scheme reinforce the common sense of the Attorney General's approach to finality. Since shortly after the enactment of Section 1105a in 1961, the regulations have provided that "[m]otions to reopen in deportation proceedings shall not be granted" unless the Board finds certain listed criteria to be met (8 C.F.R. 3.2; see 27 Fed. Reg. 97 (1962)). The granting of a motion to reopen is discretionary, and such motions are disfavored in immigration proceedings. *INS* v. *Doherty*, 112 S. Ct. 719, 724 (1992); *INS* v. *Abudu*, 485 U.S. 94, 107-108 (1988). "This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 112 S. Ct. at 724-725. Because motions to reopen or reconsider are to be granted only rarely by the Board, the strong public interest that weighs against delay also weighs against postponing the statutory deadline for seeking judicial review simply because a motion to reopen or reconsider has been filed. Furthermore, since 1962, the regulations have required motions to reopen or reconsider to state whether "the validity of the deportation order has been or is the subject of any judicial proceeding," and the status of any such proceeding (8 C.F.R. 3.8(a); see 27 Fed. Reg. 7488 (1962))—thereby recognizing that judicial review may proceed notwithstanding the filing of the motion. See *Nocon* v. *INS*, 789 F.2d 1028, 1033 n.5 (3d Cir. 1986) (noting that 8 C.F.R. 3.8(a) "appears to assume the continuing appealability of the original deportation order" notwithstanding the filing of a motion to reopen or reconsider).

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[17] The finality of the Board's order is underscored by the fact that if the alien is deported notwithstanding the filing of a motion to reopen or reconsider (as the regulations allow), the alien thereafter has no recourse to the courts to challenge the order. See 8 U.S.C. 1105a(c); *White* v. *INS*, 6 F.3d 1312, 1316-1317 (8th Cir. 1993).

2. The Attorney General's implementation of the INA in these respects, particularly her specification of what constitutes a final deportation order, is entitled to substantial deference. The Attorney General is charged with "the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens," with certain exceptions for laws relating to the powers of other government officials, see *Sale* v. *Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2559 (1993)—"[p]rovided, however, [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a). The Attorney General further is charged with establishing "such regulations * * * as [s]he deems necessary for carrying out [her] authority under the provisions of [the INA]." *Ibid.*; see also 8 U.S.C. 1252(b) (deportation proceedings shall be conducted "in accordance with such regulations, not inconsistent with [the INA], as the Attorney General shall prescribe," and "the decision of the Attorney General shall be final").

In light of these express delegations of authority, the Attorney General's regulations implementing the statutory scheme for determining the deportability of aliens and effecting their deportation may be set aside only if they are arbitrary, capricious, or manifestly contrary to the INA. *Sullivan* v. *Zebley*, 493 U.S. 521, 528 (1990) (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984)). As the Court has explained:

> In administering this country's immigration laws, the Attorney General and the INS confront an onerous task even without the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process. * * * The

> Act commits the definition of the standards in the Act to the Attorney General and [her] delegate in the first instance, "and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute."

INS v. *Rios-Pineda*, 471 U.S. 444, 450-451 (1985) (quoting *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam)). Where the Attorney General necessarily promulgates rules to fill a " 'gap left, implicitly or explicitly, by Congress,' the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (quoting *Chevron*, 467 U.S. at 843, and *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)).

In *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), this Court held that where, as here, an Act of Congress does not specify when agency action is "final" for purposes of judicial review, but does confer on the agency concerned the authority to promulgate regulations to implement the Act, the agency may properly prescribe by regulation when agency action becomes final for those purposes.[18]

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[18] The Court also explained in *Weinberger* v. *Salfi* that a "final" administrative decision is a "statutorily specified jurisdictional prerequisite" for judicial review under the Social Security Act, 42 U.S.C. 405(g), even though it is "not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332." 422 U.S. at 766. The court of appeals in the instant case similarly emphasized the jurisdictional nature of its ruling (Pet. App. A9), noting that it was "mindful of the Supreme Court's admonition in *Cheng Fan Kwok* v. *I.N.S.*, 392 U.S. 206, 212 (1968)":

> Section 106(a) [8 U.S.C. § 1105a(a)] is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with

The Court has previously applied the same principle under the INA, twice holding that regulations issued by the Attorney General to govern the conduct of deportation proceedings may properly give content to the term "final deportation order" in Section 1105a, and thereby determine the scope of judicial review under that provision. See *Foti* v. *INS*, 375 U.S. 217, 229-230 & n.16, 232 (1963) ("[c]learly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceeding to review such orders"); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 214, 216-217 & n.17 (1968).

The Attorney General has invoked the same authority in the present context, specifying that the Board of Immigration Appeals' dismissal of an appeal constitutes and

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precision and with fidelity to the terms by which Congress has expressed its wishes.

In other contexts as well, the courts of appeals have recognized that Section 1105a(a)(1) is jurisdictional in nature, that the statutory deadline is not subject to equitable tolling, and that it cannot be suspended without running afoul of Federal Rule of Appellate Procedure 26(b), which expressly prohibits courts from enlarging the time within which petitions for review must be filed. See, *e.g.*, *Karimian-Kaklaki* v. *INS*, 997 F.2d 108, 111-112 (5th Cir. 1993) (court without jurisdiction to review petition that although mailed two days prior to expiration of 90-day period following Board's issuance of final deportation order, was received by court on 92d day; tolling of 90-day period inappropriate because timely petition is jurisdictional requirement and Fed. R. App. P. 26(b) prohibits court from enlarging time periods for filing petitions for judicial review); *Stajic* v. *INS*, 961 F.2d 403, 404 (2d Cir. 1992) (per curiam) (timely filed petition is jurisdictional prerequisite to judicial review); *Amaral* v. *INS*, 977 F.2d 33, 35 (1st Cir. 1992); *Te Kuei Liu* v. *INS*, 645 F.2d 279, 282-283 (5th Cir. 1981) (review powers of court limited by statutory time limit); *Lee* v. *INS*, 685 F.2d 343, 343 (9th Cir. 1982) (per curiam) (dismissing petition for review filed after the "mandatory and jurisdictional" time limit of Section 1105a(a)(1)).

remains a final deportation order, notwithstanding the alien's subsequent filing of a motion to reopen or reconsider. It is especially appropriate for the Attorney General to determine the consequences of such a motion, because "[t]here is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derive[s] solely from regulations promulgated by the Attorney General." *INS* v. *Doherty*, 112 S. Ct. at 724;[19] compare *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 277-278 (1987) (discussing statutory provision for reopening and reconsideration of ICC orders). The Attorney General's determination therefore must be sustained unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Sullivan* v. *Zebley*, 493 U.S. at 528 (quoting *Chevron*, 467 U.S. at 844).

The Attorney General's approach to the finality issue in this context plainly is not arbitrary or capricious; it represents an entirely reasonable implementation of the INA, by balancing the need for finality and expedition in deportation proceedings against the interest in providing a safety valve to remedy defects in exceptional cases. And, as we explain in Part B below, far from being "manifestly contrary" to the INA, the Attorney General's approach is reinforced by the text, structure, and background of that Act. The INA is not so rigid as to afford the Attorney General the discretion to provide for reopening or reconsideration of final deportation orders only at the cost of undoing the finality of those orders.

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[19] Indeed, the Board of Immigration Appeals is entirely a creature of the Attorney General's regulations. See 8 C.F.R. 3.1.

B. The Text, Structure, And Background Of The Immigration And Nationality Act Reinforce The Attorney General's Approach To Finality In This Setting

1. *The 1961 Enactment of 8 U.S.C. 1105a*

When Congress first enacted the INA in 1952, it did not include special statutory procedures for judicial review of deportation orders. This Court subsequently held, however, that judicial review of deportation orders imposed under the INA was governed by the general provisions of the Administrative Procedure Act. Act of June 11, 1946, ch. 324, § 10, 60 Stat. 243 (APA). See *Shaughnessy* v. *Pedreiro,* 349 U.S. 48 (1955) (holding that APA provisions making available district court action for declaratory and injunctive relief applied under 1952 INA, and that habeas corpus proceeding was no longer sole means of challenging deportation order).

By 1961, however, Congress was disturbed by meritless actions in deportation cases "brought solely for the purpose of preventing or delaying indefinitely [the alien's] deportation from this country." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). In an effort to curtail delaying tactics, Congress abandoned the APA's general procedure for judicial review and instead incorporated into the INA the procedures for judicial review set forth in the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, popularly known as the Hobbs Act.[20] See Act of Sept. 26,

[20] The Hobbs Act was enacted in 1950 to govern judicial review of orders of certain specified agencies, such as the Federal Communications Commission, the Secretary of Agriculture, and the United States Maritime Commission. See Act of Dec. 29, 1950, ch. 1189, 64 Stat. 1129. It was patterned after the procedures established for judicial review of Federal Trade Commission orders and adopted for judicial review of orders issued by the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board. See S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950). In enacting the Hobbs Act, Congress believed that the new procedures that gave courts of appeals jurisdiction to review cases based on the administrative record (rather than conferring jurisdiction on three-judge courts empowered to conduct evidentiary hearings) would "make for economy and expedition" in the disposition of cases in federal courts. *Id.* at 5.

The Hobbs Act was originally codified at 5 U.S.C. 1031 *et seq.* (Supp. IV 1950), following the APA. In 1966, however, the Hobbs Act was moved from Title 5 to its current location in Title 28 of the United States Code. See Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(e), 80 Stat. 621-625. The Hobbs Act accordingly is now referenced in 8 U.S.C. 1105a(a) (Supp. IV 1992) as "the provisions of chapter 158 of title 28."

1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. That incorporation was contained in a new Section 106 of the INA, codified at 8 U.S.C. 1105a (1988 & Supp. IV 1992). The purpose of the new section was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States," so as to expedite judicial review and limit the duration of deportation proceedings. H.R. Rep. No. 1086, *supra,* at 22-23; see *Foti* v. *INS,* 375 U.S. at 224.

Congress did not incorporate the Hobbs Act's procedural scheme in its entirety for deportation cases, however, because it concluded that "certain specified exceptions" were "made necessary by the unique subject matter of the proposal." H.R. Rep. No. 1086, *supra,* at 22. The first of those exceptions—Section 1105a(a)(1)—established the deadline for filing a petition for judicial review. That provision stated that a petition for review may be filed "not later than" six months (now 90 days) from the "final deportation order." The Hobbs Act, by contrast, states that upon entry of a final order reviewable under the Act, a party "may, within 60 days after its entry, file a petition to review the order in the court of appeals." 28 U.S.C. 2344. Congress's

departure from that more permissive language of the Hobbs Act in favor of the phrase "not later than" in Section 1105a(a)(1) suggests an intent to impose a filing deadline that is fixed immediately upon "issuance" of the "final deportation order." It therefore cuts against the notion that the running of the 90-day period must be tolled or postponed if a motion to reopen or reconsider is subsequently filed with the Board.[21]

The framework for staying deportation orders established by the 1961 legislation bolsters the reasonableness of the Attorney General's judgment regarding administrative finality. Congress specified that the new judicial review provision was not to be construed "to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section." 8 U.S.C. 1105a(a)(8) (Supp. IV 1992) (codified in 1961 at 8 U.S.C. 1105a(a)(7) (Supp. III 1961)). In the event that an alien properly pursued his right to judicial review, however, Congress further provided that service of the petition "shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs." 8 U.S.C. 1105a(a)(3) (Supp. IV 1992).[22] At the

[21] This conclusion is not undermined by the fact that Congress provided a six-month period for seeking judicial review under the INA, rather than the 60-day period under the Hobbs Act. Congress could reasonably have determined that because it established a fixed cut-off time, it could be more generous in the total time allotted without unduly compromising its ultimate aim to place a limit on the length of deportation proceedings, especially since a reopening or reconsideration motion might be filed and disposed of during the extended period. See *Nocon* v. *INS*, 789 F.2d at 1033 (citing H.R. Rep. No. 1086, *supra*, at 22-23, 29-30); *Alleyne* v. *INS*, 879 F.2d 1177, 1181 n.7 (3d Cir. 1989).

[22] As amended in 1990, the automatic stay upon service of the petition for review does not apply if the alien has been convicted of an aggravated felony. See 8 U.S.C. 1105a(a)(3) (Supp. IV 1992).

same time, Congress did not disturb the longstanding rule under the governing regulations that a motion to reopen or reconsider does *not* stay the execution of a final deportation order. See pages 15, 16, *supra*. Congress's omission of any statutory provision for an automatic stay in those circumstances, coupled with its provision for such a stay only after a petition for judicial review has been filed, reflects an intent to suspend the operative effect of the final deportation order only in the latter situation. The Act thereby creates a framework for prompt judicial review. As the Eighth Circuit reasoned in *White* v. *INS*, 6 F.3d 1312, 1317 (1993): "The automatic stay of execution of a final order of deportation that accompanies a petition for review, considered by Congress important enough to be mandatory in immigration law, is corrupted by the scenario of suspended finality" upon the alien's mere filing of a motion to reopen or reconsider with the Board.

2. *The 1990 Amendments*

Any doubt concerning the validity of the Attorney General's determination that a motion to reopen or reconsider does not render a final deportation order nonfinal (and therefore does not suspend the period within which judicial review must be sought) was "put to rest" by Congress in 1990. See Pet. App. A8 (quoting *Akrap* v. *INS*, 966 F.2d 267, 271 (7th Cir. 1992)).[23]

[23] The question presented in this case was noted in *Woodby* v. *INS*, 385 U.S. 276, 286 n.20 (1966). In that case, the INS argued in the court of appeals that judicial review was limited to determining whether the Board's denial of the alien's motion for reconsideration was an abuse of discretion, because the petition for judicial review was filed more than six months after the issuance of the order of deportation (although within six months after the denial of the motion for reconsideration). The court of appeals concluded that it "need not decide this suggested limitation upon [its] review powers because * * *

a. First, Congress added a new paragraph (6) to Section 1105a(a), directing that "whenever a petitioner seeks

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[it was] persuaded that the Board orders must be affirmed on either ground." *Woodby* v. *INS*, 370 F.2d 989, 992 (6th Cir. 1965). After the court of appeals' decision in *Woodby*, the Ninth Circuit held in *Bregman* v. *INS*, 351 F.2d 401 (1965), that in such a situation it had jurisdiction to review the deportation order as well as the denial of the motion to reconsider.

The government's subsequently filed brief in this Court in the *Woodby* case abandoned the contention made in the court of appeals, in light of *Bregman*. 66-40 Gov't Br. at 8 n.3. In its opinion in *Woodby*, the Court noted that the court of appeals had not passed on the question and that the government had since abandoned its contention. 385 U.S. at 286 n.20. The dissent stressed the importance of the issue which the majority had "ignore[d]." 385 U.S. at 291 (Clark, J., joined by Harlan, J.). It reasoned that the legislative history of Section 1105a "makes it clear that Congress intended it to be strictly enforced * * *. Since there is no time limit on petitions for rehearing or reconsideration, permitting review of a final order of deportation merely because a timely petition for review of an administrative refusal to reopen the proceedings has been filed would negate the congressional purpose behind the insistence on timely filing" in Section 1105a. *Ibid.* (citations omitted).

In the years prior to and shortly after the *Woodby* case, the issue appears to have arisen mainly in cases in which the motion to reopen or reconsider had been filed after expiration of the six-month period for seeking judicial review. The courts universally rejected such belated attempts to obtain judicial review; the analyses by those courts, however, often indicated that they likewise would have rejected petitioner's approach, because their reasoning turned on whether the petition for judicial review was filed within six months of the entry of the deportation order, rather than on whether the motion to reopen or reconsider was filed within that time period, as petitioner urges. See, *e.g.*, *Chul Hi Kim* v. *INS*, 357 F.2d 904, 906 (7th Cir. 1966); *Gena* v. *INS*, 424 F.2d 227, 231 (5th Cir. 1970).

In *Santiago* v. *INS*, 526 F.2d 488, 489 n.3 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976), the INS unsuccessfully argued against jurisdiction in a case similar to this one. See also *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1473-1474 (9th Cir. 1983) (same), cert. denied, 467 U.S. 1216 (1984). After the Third Circuit adopted the INS's jurisdictional argument in *Nocon* v. *INS*, 789 F.2d 1028 (1986), the circuits remained split, as discussed by the court of appeals below, both before and after the 1990 amendments. See Pet. App. A4-A8.

review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." 8 U.S.C. 1105a(a)(6) (Supp. IV 1992); see Immigration Act of 1990, Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 5065. This provision necessarily rests on the premise that a petition for judicial review of a deportation order may be filed separately from a petition for judicial review of the denial of a motion to reopen or reconsider.

Petitioner nevertheless suggests (Pet. Br. 38) that the provision for consolidation "is most easily given effect when the motion to reopen has already been decided at the time the petition for review is filed," and that "this situation is most easily enabled by permitting tolling." But in the scenario described by petitioner, only one petition for review would ordinarily be filed (as was true in petitioner's case), and there would be nothing to consolidate. See *Akrap* v. *INS*, 966 F.2d at 271 ("If the filing of a motion to reopen were to render any previous orders non-final, only one final order would exist—and what then would be subject to 'consolidation' * * * ?"). Section 1105a(a)(6) would thereby be rendered superfluous, "a disfavored result that should be avoided where possible." *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2396 (1994); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015-1016 (1992).

Moreover, under petitioner's theory, it would not merely be easier to "give[ ] effect" to the consolidation provision if the motion was decided before the alien petitioned for judicial review; that would be the only manner in which the deportation order could be reviewed, because the order would not again become final, under petitioner's theory, until the motion to reopen or reconsider was decided.[24]

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[24] Indeed, in some jurisdictions that have adopted petitioner's approach, the court will dismiss an alien's petition seeking judicial review of a final deportation order if the alien filed a motion to reopen

Again, in such a situation, "multiple reviewable orders would not exist to consolidate." *Bauge* v. *INS*, 7 F.3d 1540, 1542 (10th Cir. 1993); see also *White* v. *INS*, 6 F.3d at 1317.

Petitioner suggests another scenario in which the consolidation provision could apply under his interpretation. He asserts that if the alien files a petition for review before he files a motion to reopen, the court would have jurisdiction over the petition and would retain jurisdiction even after the motion was filed with the Board. See Pet. Br. 39 n.8 (citing *Ogio* v. *INS*, 2 F.3d 959, 960-961 (9th Cir. 1993)). That petition could later be consolidated with a petition seeking judicial review of the Board's denial of the motion to reopen. Neither petitioner nor the Ninth Circuit explains, however, why the filing of a petition before the motion instead of after makes a difference as to whether the motion renders the Board's order nonfinal for purposes of judicial reivew.[25] The court of appeals noted that

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or reconsider before he sought judicial review and that motion is still pending before the Board. Those courts reason that the final deportation order has been rendered "nonfinal" by the filing of the motion to reopen or reconsider, thus depriving the court of jurisdiction to review it. That approach has resulted in some aliens' being precluded from obtaining any judicial review of their deportation orders because, after the Board later denied the alien's motion, the alien did not file a second petition for review on the erroneous belief that the still-pending first petition had preserved the right of judicial review. See, *e.g.*, *Fleary* v. *INS*, 950 F.2d 711, 712-713 (11th Cir. 1992) (an alien's premature, "unripe appeal is not curable by subsequent agency action"). Cf. *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989).

[25] Indeed, the Ninth Circuit's discussion of the issue in *Ogio* is dictum inasmuch as the motion for reconsideration in that case was filed before the petition for judicial review. The *Ogio* dictum rests on the Ninth Circuit's reasoning in *Berroteran-Melendez* v. *INS*, 955 F.2d 1251 (1992).

The court in *Berroteran-Melendez* was faced with a situation in which the alien had filed a petition for judicial review and then subsequently filed a motion to reopen or reconsider with the Board. The court of appeals concluded, without analysis, that it had jurisdiction over the petition notwithstanding the filing of the motion with the Board. The court then addressed the question whether it should grant the alien's motion to suspend the judicial proceeding pending the disposition of the motion before the Board. It acknowledged that "under Ninth Circuit law, there is no substantive difference between the filing of a motion to reopen *before* the petition for review, in which case the time for filing the petition runs from the date of the decision on the motion to reopen, and where a motion to reopen is filed *after* the petition for review and the appellate proceedings are suspended. The appellate process would not be further delayed." 955 F.2d at 1255. The court nonetheless declined to suspend the court proceedings and followed the approach taken by the Third Circuit in *Alleyne* v. *INS*, 879 F.2d 1177 (1989), which was contrary to Ninth Circuit authority on the tolling issue, but which demonstrated that suspending appellate proceedings pending Board disposition of a motion to reopen "would effectively create an automatic stay of deportation pending the outcome of a motion to reopen." 955 F.2d at 1255 (citing *Alleyne* v. *INS*, 879 F.2d at 1181 n.7). Such a result would be contrary to the longstanding regulations that provide that the filing of a motion to reopen or reconsider does not stay deportation. The Ninth Circuit also concluded in *Berroteran-Melendez* that while suspension of judicial proceedings would promote judicial efficiency, "the potential for abuse of the process to circumvent the [Board's] discretionary power to grant or deny a stay of deportation pending a motion to reopen outweighs concerns with efficiency." 955 F.2d at 1255; see also *Alleyne* v. *INS*, 879 F.2d at 1181 n.7. Thus, the approach suggested by petitioner and the Ninth Circuit does not eliminate the possibility of more than one judicial review proceeding.

"[t]his is admittedly a complicated state of affairs," but felt bound by circuit precedent "[g]iven the way [its] law has developed." 2 F.3d at 961 & n.1. This Court, however, is not similarly bound. There accordingly is no reason for this Court to adopt an interpretation of Section 1105a that would both require such a strained reading of the consolidation paragraph Congress added to that Section in 1990 and lead to such an "admittedly * * * complicated

state of affairs" as a practical matter—and that would rigidly confine the broad rulemaking authority conferred on the Attorney General by other provisions of the INA.

b. In 1990, Congress also directed the Attorney General to issue regulations regarding motions to reopen or reconsider, including regulations that (1) set a maximum time period for filing such motions, and (2) limit the number of such motions that may be filed. See Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 5066.[26] The Conference Report expressed the view that unless the Attorney General "finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the *final* determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 133 (1990) (emphasis added).[27] That statement manifests

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[26] Congress also directed the Attorney General to "report on abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits." Immigration Act of 1990, Pub. L. No. 101-649, § 545(c), 104 Stat. 5065-5066. Petitioner points to the resulting report (Attorney General's Report to Congress on Consolidation of Requests for Relief from Deportation, excerpted at Pet. Br. App.) to support his contention that there is not a significant problem of aliens' abusing the system to delay deportation. Pet. Br. 13-14, 31-32. The report does not, however, analyze abuses associated with motions for reopening or reconsideration by the Board. Rather, it focuses on the issues the Attorney General was directed by Congress to address—abuses at the first hearing on the merits before an immigration judge and abuses associated with the failure to consolidate requests for discretionary relief at that stage. Thus, the results of the survey and study cited by petitioner are not germane to the time limit for seeking judicial review, at issue here.

[27] The Attorney General also must "consider exceptions in the interest of justice" and for changed circumstances in asylum cases. H.R. Conf. Rep. No. 955, *supra*, at 133. The proposed rules for implementing the congressional directive were published on June 7, 1994. See 59 Fed. Reg. 29,386-29,391. The time for submission of written comments expired on August 8, 1994. The proposed rules provide, in relevant part, that a party may file only one motion to reopen proceedings and one motion to reconsider a decision of an immigration judge, the Board, or a service officer. A motion to reopen proceedings must be filed within 20 days of the final administrative decision. A motion to reconsider a decision must be filed within 20 days of the decision. A party may not seek reconsideration of a decision denying a previous motion to reconsider. An alien who has filed an asylum claim or sought withholding of deportation may move to reopen at any time where the claim is based upon an alleged change in circumstances in the country of the alien's nationality. See 59 Fed. Reg. 29,387-29,390 (1994).

an understanding that an order of deportation is final regardless of the subsequent filing of a motion to reopen or reconsider. At the same time, Congress shortened by half (from six months to 90 days generally, and from 60 to 30 days for aggravated felons) the deadline for filing a petition for judicial review, see Immigration Act of 1990, Pub. L. No. 101-649, §§ 502(a), 545(b)(1), 104 Stat. 5048, 5065, thereby strengthening the statutory policy of expedition in review of deportation orders.

If Congress in 1990 had intended that the Board's final order would be rendered nonfinal—and that judicial review would thereby be postponed—by the alien's mere filing of a motion to reopen or reconsider, it presumably would have stated as much in the course of providing for the shortening of *both* the deadline for filing such motions and the deadline for filing petitions for judicial review. Significantly, moreover, Congress once again declined to disturb the longstanding regulation providing that execution of a final deportation order is not stayed pending the disposition of a motion to reopen or reconsider.

c. In sum, when viewed against the 1990 amendments as well as the 1961 enactment, the Attorney General's interpretation and implementation of the INA's reference to "final deportation order" is "most consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions." *Cheng Fan Kwok* v. *INS*, 392 U.S. at 218.

C. The Court's Decision In *ICC* v. *Brotherhood of Locomotive Engineers* Does Not Require A Different Result

Petitioner contends (Br. 12, 20, 42) that this Court's decision in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987), requires that the Attorney General's position be rejected. That case concerned judicial review of two rulings by the Interstate Commerce Commission (ICC)—(1) its denial of a petition requesting that it clarify prior decisions in a railroad proceeding, and (2) its denial of a petition requesting reconsideration of that denial. The Court principally addressed whether the ICC's denials of the petitions were judicially reviewable. *Id.* at 277-284, 285-287; see note 13, *supra*.

In the course of its analysis, however, the Court also held that the filing of the petition with the ICC for reconsideration of its earlier order stayed the running of the 60-day period under the Hobbs Act for seeking judicial review of that earlier order until the ICC acted on the motion for reconsideration. 482 U.S. at 284-285. In reaching that conclusion, the Court acknowledged that "[a] contrary conclusion is admittedly suggested by the language of the Hobbs Act and of 49 U.S.C. § 10327(i), which provides that, '[n]othwithstanding' the provision authorizing the Commission to reopen and reconsider its orders (§ 10327(g)), 'an action of the Commission * * * is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.' " 482 U.S. at 284 (quoting 49 U.S.C. 10327(i)). "This would seem to mean," the Court continued, "that the pendency of reconsideration motions does not render Commission orders nonfinal for purposes of triggering the Hobbs Act limitations period." 482 U.S. at 284. The Court noted, however, that the same argument could be made with respect to the similar provision of the APA, 5 U.S.C. 704, but that the APA provision has been construed "merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review * * *, but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." 482 U.S. at 284-285. The Court stated that it could "find no basis for distinguishing the language of [49 U.S.C.] § 10327(i) from that of [5 U.S.C.] § 704." *Id.* at 285.

The Court's discussion of the specific tolling issue presented in *Locomotive Engineers* under the ICC statute does not lead to the conclusion that the Attorney General's regulatory implementation of the INA is invalid.[28] As relevant here, the Court stated only that 5 U.S.C. 704 has been construed "not to *prevent* petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." 482 U.S. at 285 (emphasis added). Our argument in this case is not that 5 U.S.C. 704 prevents a motion for reopening or reconsideration of a deportation order from rendering the order nonfinal. Rather, it is that the INA confers on the Attorney General the authority to determine what constitutes a "final deportation order" within the meaning of the particular provision of the INA that governs judicial review of such orders.

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[28] See *White* v. *INS*, 6 F.3d at 1314-1317 (distinguishing *Locomotive Engineers*); *Alleyne* v. *INS*, 879 F.2d at 1180-1182 & n.7 (same).

The Court did not hold in *Locomotive Engineers* that 5 U.S.C. 704 overrides such an exercise of rulemaking authority under another Act of Congress and affirmatively *requires* that petitions for reconsideration render the orders under reconsideration nonfinal under every statutory scheme.[29] Nothing in the text of 5 U.S.C. 704 suggests that extraordinary result, which would be inconsistent with this Court's recognition that the Executive officer charged with administering an Act of Congress—specifically including the INA—has the authority to determine what constitutes a "final" decision for purposes of judicial review. See pages 19-20, *supra,* discussing *Weinberger* v. *Salfi,* 422 U.S. at 466; *Cheng Fan Kwok* v. *INS,* 392 U.S. at 216-217 & n.17; and *Foti* v. *INS,* 375 U.S. at 229-230 & n.16, 232. To the contrary, the Court acknowledged in *Locomotive Engineers* that 5 U.S.C. 704 on its face indicates that the pendency of a reconsideration motion does *not* render an agency order nonfinal for purposes of triggering the time for seeking judicial review. See 482 U.S. at 284.

Furthermore, this case involves judicial review provisions that are different than those at issue in *Locomotive Engineers.* There, the Court was concerned with provisions of the statute governing review of administrative orders of the ICC, 49 U.S.C. 10327(i), and the filing period under the Hobbs Act itself, 28 U.S.C. 2344, which expressly governs judicial review of such ICC orders (see 28 U.S.C. 2342(5)).

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[29] In *Locomotive Engineers,* the ICC took the position, in light of consistent agency practice under its statutory and regulatory scheme, that the filing of a petition for reconsideration did render the particular order at issue nonfinal and therefore did stay the running of the 60-day limitations period under the Hobbs Act. See 85-792 and 85-793 ICC & U.S. Supp. Br. at 4-8. The Court therefore did not have occasion to consider the validity of an administrative implementation of the ICC statute (or any other statute) under which a motion to reconsider does not undo the finality of the earlier order.

Although Section 1105a generally incorporates by reference into the INA the judicial review provisions of the Hobbs Act, it specifically departs from the Hobbs Act in a number of respects in order to tailor judicial review to the special context of deportation. And Congress did not just change the number of days listed in the Hobbs Act, it rephrased the entire provision. In lieu of the Hobbs Act language providing that a party "aggrieved by the final order may, within 60 days after its entry, file a petition to review the order" (28 U.S.C. 2344), Congress drafted the INA provision to direct that a petition "may be filed *not later than* 90 days after" the "issuance of the final deportation order." 8 U.S.C. 1105a(a)(1) (Supp. IV 1992) (emphasis added). By virtue of the "not later than" language in Section 1105a(a)(1), it may be read to resemble more a "period of repose," imposing an unequivocal outside limit or cut-off for filing, than a typical limitations period. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U.S. 350, 363 (1991). Tolling principles are inconsistent with periods of repose where the primary interest is in achieving closure. *Ibid.* We do not suggest that a phrase such as "not later than" must always be construed to preclude application of tolling principles. But here, when read together with the structure of 8 U.S.C. 1105a as a whole and against the background of Congress's manifest purpose in enacting and amending Section 1105a, the language Congress employed in departing from the Hobbs Act supports the validity of the Attorney General's approach to the finality issue under the INA.

Moreover, in this case, the statute uses a term of art—"final deportation order"—that has been given specific content in implementing regulations (8 C.F.R. 243.1) that were intended specifically to "show when" this particular type of order "becomes final" (26 Fed. Reg. 12,111 (1961)), that were promulgated within months of the

enactment of the statutory provision that establishes the finality of the order as a prerequisite to judicial review, and that have remained in effect, unaltered, throughout the subsequent 33 years. Furthermore, the provision for reopening or reconsideration of a final deportation order derives entirely from regulations of the Attorney General, unlike in *Locomotive Engineers,* where the ICC statute itself provided for petitions to reopen or reconsider (see 482 U.S. at 277-278, citing 49 U.S.C. 10327(g)), and thus lent some force to the ICC's practice of not regarding an order as final for purposes of judicial review until such a petition was disposed of.

This case also differs from the three decisions cited by the Court in the portion of *Locomotive Engineers* on which petitioner relies. In the first of the three cases cited by the Court, the ICC had reopened the administrative record in a case after some of the parties had filed suit in federal court. *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532 (1970). Although the *American Farm Lines* opinion did include the dictum on which the *Locomotive Engineers* opinion relied—stating that "[u]nless Congress provides otherwise," there is no final action until a motion for rehearing is denied, 397 U.S. at 541—the Court clearly recognized that contemporaneous administrative and judicial proceedings do not necessarily collide and are not always precluded, as petitioner's approach suggests. Moreover, here, as we have explained, Congress and the Attorney General have "provide[d] otherwise" in the statutory and regulatory framework of the INA.

In *CAB* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961), the Court stated, likewise in dictum, only that there is a "general notion" that administrative orders are not final for purposes of judicial review until outstanding petitions for reconsideration are disposed of, and it referred to the general provisions of the APA concerning finality. See

367 U.S. at 326-327. Moreover, elsewhere in the *CAB* opinion, the Court specifically noted that review of the statutes enacted by Congress to address the various administrative agencies "reveal[ed] a wide variety of detailed provisions concerning reconsideration, *each one enacted in an attempt to tailor the agency's discretion to the particular problems in the area.*" *Id.* at 322 (emphasis added). In the third case cited in *Locomotive Engineers*—*i.e., Outland* v. *CAB,* 284 F.2d 224, 227 (D.C. Cir. 1960)—the agency concerned took the position that the order should be regarded as having been rendered nonfinal under the judicial review statute at issue there by the filing of a petition for rehearing, and the court concluded the "[p]ractical considerations" supported the result it reached. As discussed above, examination of how Congress crafted the INA, in an attempt to tailor judicial review differently for purposes of final deportation orders and the particular problems associated with delay in deportation proceedings, demonstrates the validity of the Attorney General's conclusion that an alien's filing of a motion with the Board to reopen or reconsider a final deportation order does not render the order nonfinal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

LISA DORNELL
Attorney

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APPENDIX

8 U.S.C. 1103 (1988 & Supp. IV 1992) provides in pertinent part:

Powers and duties

(a) Attorney General

The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or

other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(b) Commissioner; appointment

The Commissioner shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. He shall be charged with any and all responsibilities and authority in the administration of the Service and of this chapter which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General.

* * * * *

8 U.S.C. 1105a (1988 & Supp. IV 1992) provides:

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony, in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Consolidation

whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

If the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(9) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

* * * * *

8 C.F.R. 3.2 provides:

Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered

or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purposes of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

* * * * *

8 C.F.R. 3.6 provides in pertinent part:

Stay of execution of decision.

(a) Except as provided in § 242.2 of this chapter and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

(b) The provisions of paragraph (a) of this section shall not apply to an order of a Immigration Judge under

§ 242.22 of this chapter denying a motion to reopen or reconsider or to stay deportation, except when a stay pending appeal has been granted by the Immigration Judge. The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge.

* * * * *

8 C.F.R. 3.8 provides in pertinent part:

Motion to reopen or motion to reconsider.

(a) *Form.* Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court

in which such proceeding took place or is pending, and its result or status. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

* * * * *

8 C.F.R. 243.1 provides:

Final order of deportation.

Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the special inquiry officer in proceedings under part 242 of this chapter shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision.

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